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TENTH REPORT ON THE DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

by

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INTRODUCTION

1. This report addresses the question of the possible establishment of an international criminal jurisdiction.

2. Part one will be devoted to a consideration of certain objections to the possible establishment of an international criminal jurisdiction.

3. Part two will be devoted to the formulation of some prospective draft provisions. In this connection, it should be noted that the General Assembly, in its resolution 46/54 of 9 December 1991, invited the International Law Commission "to consider further and analyse the issues raised in its report on the work of its forty-second session concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism in order to enable the General Assembly to provide guidance on the matter".

4. It is a happy coincidence that this was precisely the approach taken by the Special Rapporteur at the forty-third session of the Commission, when he sought to analyse two major issues raised by the establishment of an international criminal court: the question of the jurisdiction of the court, and the question of criminal proceedings. The Special Rapporteur's approach had involved proposing prospective provisions for the sole purpose of better stimulating and guiding the Commission's discussion of these issues. 1/

5. With the same aim, the present report will seek to return to those two major issues and devote to them two prospective draft provisions prepared in the light of the discussion at the forty-third session of the Commission and at the forty-fifth session of the General Assembly.

6. In addition, new prospective draft provisions are being submitted to the Commission. They deal with the law to be applied by the court, proceedings relating to compensation for damage, the handing over of the alleged offender to the court, and the double-hearing principle.

I. PART ONE - CONSIDERATION OF CERTAIN OBJECTIONS TO THE POSSIBLE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION

7. Before several issues concerning the establishment of an international criminal court are examined in detail, it may be useful to take a hard look at certain reservations or objections raised by some States, in United Nations forums or within their own domestic agencies, regarding the establishment of such a court.

1/ See the ninth report of the Special Rapporteur (A/CN.4/435/Add.1).

8. Some of the objections have to do with the desirability or otherwise of establishing such a court, given the current international situation. Other objections relate to the question of compatibility between such a court and domestic legal provisions of States.

9. One of the objections in the first category is that the current system of international proceedings based on universal jurisdiction has produced rather satisfactory results, and that the establishment of a court could diminish the scope of that rule and impede its application.

10. This objection fails to take into account the fact that the principle of universal jurisdiction has major drawbacks. States are often subjected to intense pressure, in the form of blackmail or in the form of violent crimes perpetrated by groups of terrorists or other criminals, either in order to block the trial of an offender by the State concerned, or in order to block extradition. Because of such pressure, the State concerned does not extradite the person, and if it decides to prosecute, the result of the trial may not be equitable, either because the defendant is acquitted, or because the penalty is completely farcical - a slap on the wrist that does not fit the crime. Because of the principle non bis in idem, the accused cannot be prosecuted again.

11. It has also been argued that a State that was reluctant to extradite a suspect at the request of another State would be just as reluctant to deal with an international criminal court.

12. An international court, however, would seem to offer greater guarantees of objectivity and independence than a third State, which would be more open to all kinds of pressure and more responsive to political representations.

13. Another contention is that an international criminal court might become a politicized organ that could often be lacking in objectivity.

14. International experience shows that this is much more likely to happen when the proceedings are instituted by a weak State whose governmental structure is not strong enough to counter moves by criminal organizations. Moreover, recent international developments make the politicization of an international criminal court a much more remote possibility.

15. Another objection to the possible establishment of an international criminal court is based on the complexity of the problems posed. There are those who doubt that it would be possible to reach international agreement on such complicated and intractable problems as the waiver by a State of its sovereign competence to try its nationals, the jurisdiction of the court, the rules of procedure, evidence, the prosecuting authority, and applicable penalties.

16. The fact is, however, that most of those issues are no more complex than similar issues already considered and settled at the time of the establishment of other international judicial organs, such as the International Court of Justice and the European Court of Human Rights. Instead of pointing to a technical snag, such objections seem to reflect a lack of political will.

17. On the question of incompatibility between an international criminal court and domestic legal provisions of some States, the argument most often cited as the most important is perhaps the one relating to the protection of basic human rights. The objection here is that an international court would be less capable of guaranteeing protection of those rights than a national court, which would be bound by constitutional provisions of domestic law governing human rights.

18. Yet a cursory review of the international situation seems to point to just the opposite conclusion. Very often when a State is itself trying to combat crimes committed by criminal organizations, such as terrorism or drug trafficking, it encounters difficulties which it can tackle only by using enforcement methods that are sometimes incompatible with respect for basic human rights.

19. On the other hand, an international court would make it possible to put some distance between the alleged offender and the victim State, thus establishing all the internationally required judicial guarantees.

20. Behind many of the objections is an apparent failure to take into account the existence of a very wide range of possible solutions, which could ease the concerns raised; but there must be some willingness to search them out. That is the aim of the draft provisions below.

II. PART TWO - PROSPECTIVE DRAFT PROVISIONS

A. The law to be applied

1. Prospective draft provision (alternatives A and B)

21. On the subject of the law to be applied, and for the purposes stated in paragraphs 4 and 5 above, the Special Rapporteur has prepared the following draft provision:

Alternative A

"The Court shall apply international criminal law and, where appropriate, national law."

Alternative B

"The Court shall apply:

(a) International coventions, whether general or particular, relating to the prosecution and prevention of crimes under international law;

(b) International custom, as evidence of a practice accepted as law;

(c) The general principles of criminal law recognized by the United Nations;

(d) Judicial decisions and doctrines of highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law;

(e) Internal law, where appropriate."

2. Commentary

22. Alternative A is synthetic and global, whereas alternative B is analytical and enumerative. Yet there is no substantive difference between them.

23. The "international criminal law" covered globally by alternative A is constituted by international conventions, international custom, the general principles of criminal law, judicial decisions and international doctrine, all of which are enumerated in alternative B. Alternative A is based on the approach used in the draft prepared by the 1953 United Nations Committee. According to article 2 of that draft, the court would apply "international law, including international criminal law, and where appropriate, national law". 2/

24. The present Special Rapporteur preferred to use in French "droit international pénal" instead of "droit pénal international". There is a difference in the content and scope of those two concepts, at least in French law.

25. The French term "droit pénal international" refers to a discipline involving the study of conflicts between domestic criminal laws, and the solutions which States, acting unilaterally or on the basis of agreements or conventions, offer to such conflicts. In that sense, "droit pénal

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2/ Report of the 1953 Committee on International Criminal Jurisdiction, Official Records of the General Assembly, Ninth Session, Supplement No. 12 (A/2645), annex, art. 2.

international" would be a branch of internal law, for it is States that enact as sovereign bodies the rules to be applied to such conflicts of law, or conclude the relevant agreements.

26. The French term "droit international pénal" covers a completely different area. It is not concerned with conflicts between domestic laws. Its domain is that of crimes under international law, i.e. crimes which because of their extreme seriousness or their particularly odious or monstrous nature, affect the human race. That is why the definition and characterization of such offences are generally considered to be matters of international law. It is therefore understandable that the international community should be seeking an international system to combat such crimes.

27. There already exist two international conventions that explicitly attribute competence (admittedly, optional competence) to an international jurisdiction to take cognizance of such offences. They are the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948 (art. VI) and the International Convention on the Suppression and Punishment of the Crime of Apartheid, of 30 November 1973 (art. V). 3/

28. Before the adoption of those Conventions, the London Agreement between the Allied Powers, of 8 August 1945, and the special proclamation by the Supreme Commander for the Allied Powers, issued at Tokyo on 19 January 1946, had laid the juridical basis for the establishment of the International Military Tribunals at Nuremberg and Tokyo respectively, with a view to punishing the major war criminals. 4/ For its part, law No. 10 of the Control Council established international tribunals in the occupation zones to punish other war criminals, who had held lower-ranking posts in the military, administrative or civilian hierarchy. 5/

29. It is true that the establishment of those jurisdictions has been criticized on the grounds that they were ad hoc tribunals instituted for a specific purpose, in violation of the rule nullum crimen sine lege, nulla

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3/ General Assembly resolution 260 (III), annex, and General Assembly resolution 3068 (XVIII), annex. For the texts of those two Conventions, see Human Rights: A Compilation of International Instruments (United Nations publication, Sales No. E.88.XIV.1).

4/ For the respective texts of the Agreement and the proclamation, as well as the Charters of the two Tribunals, see the document entitled "Draft Code of Offences against the Peace and Security of Mankind: Compendium of relevant international instruments" (A/CN.4/368).

5/ For the text of law No. 10, see Henri Meyrowitz, "La répression par les tribunaux allemands des crimes contre l'humanité et de l'appartenance à une organisation criminelle", thesis (Paris, Librairie générale de droit et de jurisprudence, 1960), annex.

poena sine lege. The fact remains, however, that their establishment was consistent with the belief that the serious, odious and monstrous nature of some crimes justified the competence of an international criminal jurisdiction.

30. Within the confines of a commentary, it is impossible to list all the conventions concerning internationally wrongful acts that may today be described as international crimes. It will be possible to turn to the draft Code of Crimes against the Peace and Security of Mankind, which, if adopted, would constitute the broadest normative base to be found in a treaty instrument, for it enumerates the criminal acts which, as of now, are of greatest concern to the international community.

31. Conventions are not, however, the only source of applicable law, despite all the codification work undertaken. Custom also has a role that must not be overlooked.

32. In article 27 of the draft Convention for the Creation of an International Criminal Court, adopted by the London International Assembly in 1943, custom was listed first among the rules of law to be applied by an international criminal jurisdiction, pending the adoption of a convention laying down the main principles of international criminal law, defining the crimes and affixing penalties to them. 6/

33. It should also be noted that the draft Statute of the International Penal Court, prepared by the International Law Association in 1926, was to refer to "international custom, as evidence of a general practice accepted as law". 7/

34. All the same, it is very awkward to apply custom in international criminal law, because of the strict nature of that branch of law, a branch where written rules usually prevail.

35. It may be difficult to apply custom, but it is no less difficult to apply general principles of law. Their application also provokes much discussion. Members of a certain formalistic school had argued that some principles, such as the principle nullum crimen sine lege, could be recognized in international criminal law only if they were established in conventions.

36. This controversy is no longer so heated, now that the principle has been established in international instruments with the adoption of the Universal Declaration of Human Rights (art. 11, para. 2) and the International Covenant

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6/ For the text of the draft, see Historical Survey of the Question of International Criminal Jurisdiction (United Nations publication, Sales No. 1949.V.8).

7/ See International Law Association, Report of the Thirty-fourth Conference (Vienna, 1926), pp. 113-125, "Art. 23. Law to be Applied".

on Civil and Political Rights (art. 15, para. 1). 8/ The difficulty remains, however, with regard to the principle non bis in idem, which was given only a lukewarm reception by the International Law Commission in the new draft Code of Crimes against the Peace and Security of Mankind, adopted on first reading (art. 7). 9/

37. As a rule, however, the principles relating to basic human rights are undoubtedly applicable under international criminal law.

38. It may be useful to point out that the International Law Association, in its draft Statute of the International Criminal Court, adopted at its Sixty-first Conference, held in Paris in 1984, included the following paragraph 1 in draft article 22, concerning the "law to be applied by the Court":

> "The Court shall apply the definition of a particular offence which is prescribed by convention(s) in force in the appropriate Contracting State(s). The Court shall apply international law including general principles of law recognized by nations." 10/

39. There can also be no doubt that judicial decisions and doctrine are applicable in international criminal law when they reflect a generally accepted practice.

40. Lastly, the elements constituting the law to be applied must also include national law. It should not be forgotten that the court may have to apply the national law of a State which has conferred jurisdiction on it, for example in the determination of the penalty. Of course, in such a situation, the national law of the State must not be incompatible with the general principles of criminal law.

41. The situation envisaged above was covered in article 27 of the 1943 draft prepared by the London International Assembly, which stated:

> "If the Court has to consider ... the law of a State of which no judge sitting on the Bench is a national, the Court may invite a jurist who has

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8/ For the texts, see Human Rights: A Compilation ..., cited in footnote 3 above.

9/ See Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10 (A/46/10), chap. IV, sect. D.1.

10/ See International Law Association, Report of the Sixty-first Conference (Paris, 1984), p. 262.

an acknowledged authority on such law to sit with it, in a consultative capacity on points of law only" (para. 4). 11/

42. This, then, is what is covered by the French term "droit international pénal".

43. Alternative A, which is synthetic in nature, is not as innovative as it might appear. It follows the approach used in the draft prepared by the 1953 United Nations Committee, except for the difference in terminology noted at the beginning of this commentary. 12/

44. Alternative B reflects the more usual trend. All the proposed statutes of an international criminal court prepared to date, with the exception of the draft produced by the 1953 United Nations Committee, to which we have just referred, have used this enumerative method. So it is with the draft Convention elaborated by the London International Assembly in 1943 (art. 27). So it is, too, with the draft formulated by the International Law Association at Vienna in 1947. 13/

45. It is also the enumerative method that is used in another context in Article 38 of the Statute of the International Court of Justice.

46. In sum, there are no substantive differences between the two draft provisions; it will be for the Commission to choose.

B. Jurisdiction of the court ratione materiae

1. Prospective draft provision

47. On the subject of the jurisdiction of the court ratione materiae, and for the purposes stated in paragraphs 4 and 5 above, the Special Rapporteur has prepared the following draft provision:

"1. All States Parties to this Statute shall recognize the exclusive and compulsory jurisdiction of the Court in respect of the following crimes:

Genocide;

Systematic or mass violations of human rights;

Apartheid;

11/ For the text, see Historical Survey ... (footnote 6 above), appendix 9.B.

12/ See footnote 2 above.

13/ See footnotes 6 and 7 above.

Illicit international trafficking in drugs;

Seizure of aircraft and kidnapping of diplomats or internationally protected persons.

2. The Court may take cognizance of crimes other than those listed above only if jurisdiction has been conferred on it by the State(s) in whose territory the crime is alleged to have been committed and by the State which has been the victim or whose nationals have been the victims.

3. The Court shall not be competent to hear appeals against decisions rendered by national jurisdictions."

2. Commentary

48. The above provision provides a dual regime of jurisdiction: a regime of exclusive jurisdiction and a regime of optional jurisdiction.

(a) Paragraph 1

49. Paragraph 1 deals with the exclusive jurisdiction of the court. Any State acceding to the statute of the court shall recognize that exclusive jurisdiction.

50. Because certain crimes are particularly serious, are odious in nature and are considerably detrimental to mankind, they must come within the purview of an international criminal court.

51. The proposed list is restrictive. However, the Commission may expand it or, on the contrary, shorten it. The Special Rapporteur's approach was based on the need for prudence. The court will have to demonstrate wisdom and restraint in order to inspire confidence and overcome reluctance. In this way, the scope of exclusive jurisdiction may gradually be expanded.

(b) Paragraph 2

52. There emerged within the Commission rather powerful opposition to the rule of exclusive jurisdiction. The opponents of that rule took the view that recourse should be had to the court only if jurisdiction was conferred on it by the States directly affected by the crime, either because it had been committed in their territory, or because they or their nationals had been the victims.

53. It is for that reason that paragraph 2 also provides for optional jurisdiction. This dual regime of jurisdiction thus reduces the scope of the

conferment-of-jurisdiction rule, which is no longer as systematic and absolute as in the draft prepared by the 1953 United Nations Committee (art. 27). 14/

54. This method makes a distinction possible between the most serious crimes, those doing massive or systematic damage to universal values (e.g., genocide and apartheid), and other crimes, limiting the exclusive-jurisdiction rule to crimes in the first category.

55. The present draft provision is therefore a middle-of-the-road solution, between the demand for exclusive jurisdiction and the demand for systematic and general application of the conferment-of-jurisdiction rule.

(c) Paragraph 3

56. Paragraph 3 closes a discussion that emerged in the Commission as to whether the court could be competent to hear appeals against decisions rendered by the highest national jurisdictions. Such an appeal would be incompatible with State sovereignty. That was the view taken by many members of the Sixth Committee of the General Assembly in statements before the Committee.

C. Complaints before the court

1. Prospective draft provision

57. On the subject of complaints before the court, and for the purposes stated in paragraphs 4 and 5 above, the Special Rapporteur has prepared the following draft provision:

> "1. Only States and international organizations shall have the right to bring complaints before the Court.
>
> 2. It shall be immaterial whether the person against whom a complaint is directed acted as a private individual or in an official capacity."

2. Commentary

58. The above provision governs the submission of cases to the court.

59. In connection with a prospective draft provision prepared by the Special Rapporteur, an interesting discussion developed in the Commission concerning

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14/ See footnote 2 above.

the conditions under which the public right of action could be exercised. 15/ One aspect of the debate had to do with whether the public right of action could be exercised by States. It turned out to be a non-issue. It is obvious that no State on its own has the right to exercise directly a power vested only in the court or in an authority competent to bring a public action at the international level. It is also obvious, however, that any State injured by an international offence has the power to bring a complaint before the court. If the complaint is justified, it should set in motion a public action at the international level.

60. The draft Statute adopted by the International Association for Penal Law in Paris on 16 January 1928 devoted article 20 of chapter III to international criminal proceedings. According to the second paragraph of that article, international criminal proceedings "may equally be undertaken by any State". 16/

61. The Special Rapporteur, in order to put an end to any discussion on this point, prefers to use the words "complaints before the Court".

62. Paragraph 2 makes a necessary clarification. There might be a temptation to believe that complaints may be directed only against private individuals. That would be a serious mistake.

63. Most of the crimes coming within the exclusive jurisdiction of the court (genocide, apartheid, etc.) can be committed only by persons vested with the power of command. Such crimes also take the form of abuses of power or authority. The perpetrators of such crimes would be able to go unpunished if their official position gave them some kind of impunity.

64. Moreover, both the draft Code of Crimes (art. 3) 17/ and the Nürnberg Principles adopted by the Commission (Principle III) 18/ state that the fact

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15/ See the ninth report of the Special Rapporteur (A/CN.4/435/Add.1), paras. 60-64; and Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10 (A/46/10), paras. 146-152.

16/ Draft Statute for the Creation of a Criminal Chamber of the International Court of Justice, prepared by Professor V. V. Pella, adopted by the International Association for Penal Law in Paris on 16 January 1928, and revised in 1946. See Historical Survey ... (footnote 6 above), appendix 7.

17/ See footnote 9 above.

18/ Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (adopted by the International Law Commission in 1950 and submitted to the General Assembly). For the text see "Compendium of instruments ..." (footnote 4 above), part I, sect. B.2 (a).

that the perpetrator of the crime acted as head of State or Government does not relieve him of responsibility under international law. Likewise, the draft Code of Crimes against the Peace and Security of Ma kind, adopted on first reading, states: "The official position of an individual who commits a crime against the peace and security of mankind ... does not relieve him of criminal responsibility".

65. The draft provision above gives only States and international organizations the right to bring a complaint. The question arises as to whether juridical persons under municipal law, such as anti-racism or human rights organizations, should be able to bring a complaint before the court. Although such organizations are constituted under municipal law, would it not be possible to take into consideration the universality of their goals?

66. The Special Rapporteur has no clear-cut position, but believes that the question merits discussion by the Commission.

D. Proceedings relating to compensation

1. Prospective draft provision

67. On the subject of proceedings relating to compensation, and for the purposes stated in paragraphs 4 and 5 above, the Special Rapporteur has prepared the following draft provision:

> "1. Any State or international organization may bring proceedings to obtain compensation for injury sustained as a result of a crime referred to the Court.
>
> 2. A State may also bring such proceedings on behalf of its nationals."

2. Commentary

(a) Paragraph 1

68. Paragraph 1 sets forth the general principle of the right to compensation.

69. Proceedings relating to compensation for injury sustained as a result of a criminal act may be brought concurrently with criminal proceedings, or separately.

70. Under national law, proceedings relating to compensation may be combined with criminal proceedings. In such instances, the criminal-court judge is required to rule in response to both the criminal proceedings and the indemnity action. There are also situations in which the victim of an offence does not have recourse to a criminal court, but prefers to seek compensation for injury in civil court.

71. A similar situation is conceivable under international law. There would be nothing to prevent the victim of an internationally wrongful act that constitutes a crime from having recourse to the International Court of Justice, on the basis of Article 36, paragraph 2 (d), of its Statute, solely in order to obtain compensation for the injury sustained, even if an international criminal court existed.

72. Would it be possible to invoke, in such a situation, the rule that criminal proceedings keep indemnity actions in abeyance? Would the International Court of Justice have to suspend consideration of the proceedings relating to compensation, pending a ruling by the international criminal court on culpability?

73. This would be tantamount to anticipating how rules of national law are to be applied under international law, and it might be better to be cautious at this stage in the development of international criminal law.

(b) Paragraph 2

74. This paragraph gives only States and international organizations the right to bring proceedings relating to compensation, and States may act either on their own behalf or on behalf of their nationals.

75. One may ask, however, whether domestic associations or organizations pursuing humanitarian goals should not be authorized to bring proceedings relating to compensation before the international criminal court. This is a matter of choice, and the Commission's discussion could give the Special Rapporteur useful guidance.

E. Handing over the subject of criminal proceedings to the court

1. Prospective draft provision (alternatives A and B)

76. On the question of handing over the subject of criminal proceedings to the court, and for the purposes stated in paragraphs 4 and 5 above, the Special Rapporteur has prepared the following draft provision:

Alternative A

"The handing over of an alleged perpetrator of a crime to the prosecuting authority of the Court is not an extradition. The International Criminal Court is deemed for the purpose of this Statute a Court common to all the States Parties to the Statute, and justice administered by this Court shall not be considered as justice emanating from a foreign court."

Alternative B

"Every State Party to this Statute shall be required to hand over to the prosecuting authority of the Court, at the request of the Court, any alleged perpetrator of a crime coming within its jurisdiction."

2. Commentary

77. The words "handing over" in the title of this draft provision are used advisedly, in order to make it clear that extradition is not involved here.

78. Extradition takes place in a system of universal jurisdictiion, such as the one provided for in article 4 of the draft Code of Crimes against the Peace and Security of Mankind. Extradition may also take place between the court and a State not party to its statute.

79. On the other hand, in connection with a State party to the statute of the court, it seems that what is involved cannot be extradition, but rather a handing over to the court. The introduction of this provision in the statute of the court would settle the problem once and for all. Every State party, knowing that it was bound by the statute, would also know that it was bound by the obligation set forth therein.

80. Alternative A, which is longer and more explanatory, clearly shows why the process is not an extradition, but simply a handing over, when a State party to the statute of the court is involved. Extradition occurs only when a State not party to the statute of the court is involved.

81. Alternative A is based on article 5 of the draft Convention for the Creation of an International Criminal Court, prepared in 1943 by the London International Assembly. The article, entitled "Legal nature of the handing over to the I.C.C. of Accused Persons" reads as follows:

"The handing over of an accused person to the prosecuting authority of the I.C.C. is not an extradition. The I.C.C. is deemed for the purpose of this Convention a Criminal Court common to all nations, and justice administered by this Court shall not be considered as foreign." 19/

82. Alternative B, which is shorter, merely states the rule, without explanation.

83. There is no substantive difference between the two alternatives.

19/ For the text, see Historical Survey ... (footnote 6 above), appendix 9.B.

F. The court and the double-hearing principle

1. Prospective draft provision

84. On the subject of the double-hearing principle, and for the purposes stated in paragraphs 4 and 5 above, the Special Rapporteur has prepared the following draft provision:

> "1. The Court shall be both a court of first instance and a court of final appeal in respect of criminal cases within its jurisdiction.
>
> 2. Nevertheless, in order to guarantee the double-hearing principle, a special chamber of judges, excluding those who were involved in making a ruling, may consider an appeal against that ruling."

2. Commentary

(a) Paragraph 1

85. Paragraph 1 is based on the practice in certain legal systems according to which rulings by the assizes, the highest national courts hearing criminal cases, are not subject to appeal. This is the situation in the French legal system and in systems related to it. In such systems, the only possible recourse against rulings by the assizes is the application for judicial review, a review which is limited to consideration of whether the ruling was in conformity with the law, but in which the facts of the case cannot be reopened.

(b) Paragraph 2

86. Paragraph 2 takes into account the opinion, expressed in the Commission, that the right of appeal is a basic human right. Since it is impossible to establish an appellate jurisdiction that would be hierarchically superior to the international criminal court, an internal appellate system has been devised to give judges who were not involved in making a ruling the power to review it on appeal.